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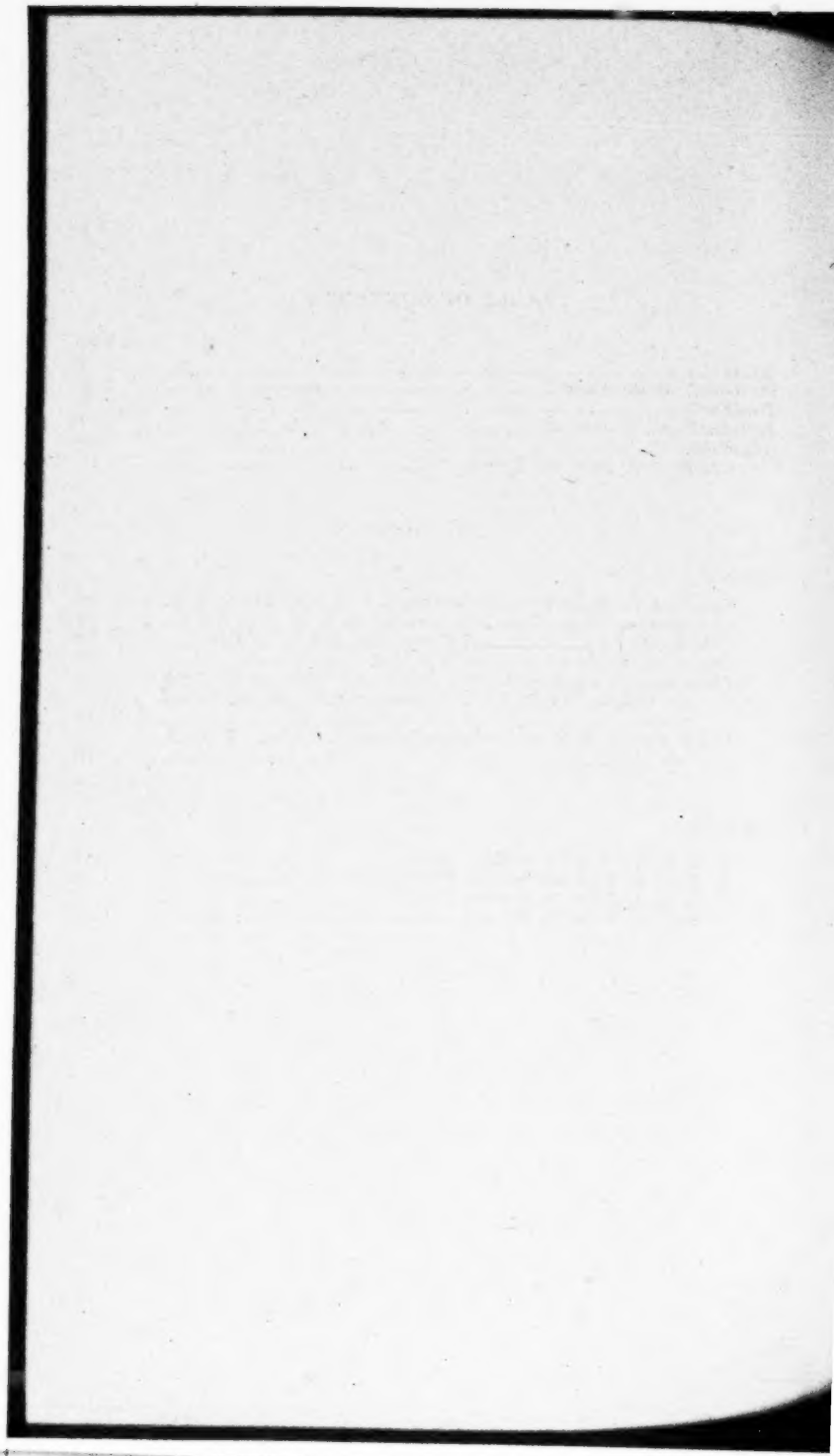

Supreme Court of the United States

SUNCOOK VALLEY RAILROAD vs. BOSTON & MAINE RAILROAD	*Petitioner*
BOSTON & MAINE RAILROAD vs. SUNCOOK VALLEY RAILROAD AND SUNCOOK VALLEY RAILROAD vs. BOSTON & MAINE RAILROAD on a counterclaim	*In the Matter of*

PETITION FOR WRIT OF CERTIORARI TO THE NEW HAMPSHIRE SUPREME COURT

To the Honorable The Supreme Court of the United States:

Your petitioner, Suncook Valley Railroad, respectfully submits this petition for a writ of certiorari to review the decree of the New Hampshire Supreme Court's dismissing the counterclaim of Suncook Valley Railroad, the counterclaimant and defendant in the above-entitled cases.

THE ISSUES

1. May two railroads having made a lease pursuant to specific Interstate Commerce Commission and New Hampshire Public Service Commission approval, subsequently, without application to, or approval from, either body, extend or shorten the line leased when there is no provision in the lease contemplating such contingency?

2. Does U. S. C. A. Title 49, Section 1 (18) or Section 5 (2) (a) (II) obligate railroads to secure a certificate of con-

venience and necessity from the Interstate Commerce Commission before changing their franchise territories?

3. Is stockholders' approval a necessary preliminary to a railroad's giving up valuable lease-track rights to another carrier?

4. Is a consideration essential to make valid a carrier's returning to another franchise and trackage rights acquired under Interstate Commerce Commission and New Hampshire Public Service Commission approval?

To visualize the new franchise territory secured by the Boston and Maine and lost to the Suncook, see the map, Exhibit No. 2. Here is focused on a reduced scale the location showing the increase in the Suncook's trackage rights and the corresponding decrease in its lease-track franchise rights.

STATEMENT OF THE CASE

The defendant, Suncook Valley Railroad, is a railroad corporation organized under New Hampshire Laws and doing business and owning property in New Hampshire. In 1936 its northern terminus was Center Barnstead from which it ran in a southeasterly direction through the towns of Pittsfield, Chichester, Epsom, Short Falls, Allenstown into Suncook serving the Suncook Valley region with rail service, freight, mail and passenger. It connected with the Boston and Maine tracks of the latter's Suncook Loop in the Suncook yard.

In 1936, after a study was made, and after applications to and hearings by the Interstate Commerce Commission and the New Hampshire Public Service Commission, and after there was secured a certificate of convenience and necessity from the Interstate Commerce Commission, the Boston and Maine leased its Suncook Loop to the Suncook Valley Railroad for an annual rental of Two Thousand Dollars. The loop operation was a difficult operating problem for the B. & M. (Commission Report, Defendant's Exhibit 5) and it was hoped that the Suncook Valley could benefit by its operation. Technical reasons made this a distinct possibility. This "loop" ran between Concord and Suncook with an extension therefrom to Hooksett.

For its own protection, the B. & M. had a recapture clause in the lease whereby it would recover twenty-five percent of

all loop freight revenues in excess of Twelve Thousand Three Hundred Dollars per year received by the Suncook Valley. In more detail this is all set out in the lease (Defendant's Exhibit 3) and Commission Reports.

The lease conveyed to the Suncook Valley comprehensive and far-reaching rights. The extent of the lease rights is set out a few pages below. The lease-hold rights, which included tracks *and the franchise,* terminated at a point where the mid-point of the Suncook Loop intersects the easterly boundary of the B. & M. main line near Bow Junction.

At one time there was a B. & M. loop station near this point and was called Bow Junction. Bow Junction, historically, was served by the loop and this station.

Northerly from the point of intersection, already mentioned, south of which it had lease rights, Suncook Valley was granted trackage rights into the City of Concord. This included two interchange tracks in the Concord yard and terminal facilities for mail and passengers.

After Interstate Commerce Commission and Public Service Commission formal approval, the lease was signed May 12, 1936, and the Suncook started its extended operations over its new lease-hold and trackage rights.

On November 1, 1941, President Colbath of the Suncook Valley (without its stockholders' approval) and President French of the B. & M. signed an indenture modifying the 1936 lease by moving the former point, at which lease rights became bare trackage rights, southerly 550 feet. In other words, the Suncook Valley had by the change, 550 feet less lease rights which became automatically thereby 550 feet of trackage rights; and the B. & M. was thereby enabled to extend its operations over these 550 feet hitherto denied to it under the Interstate Commerce Commission and Public Service Commission approved lease and indenture of 1936. It is agreed that certain switches, to be mentioned later, were cut in within these 550 feet. (R. 110).

The amending indenture is Plaintiff's Exhibit A.

Fortified with this amendment the B. & M. proceeded with its own crew to haul all tonnage consigned to and from the Merrimack Farmers' Exchange grain elevator at Bow Junction,

which had been constructed in the interim and which was completed in December, 1941. (R. 113). Over this same newly acquired track, in addition, it hauled coal into Bow Junction consigned to the Public Service Company of New Hampshire for use at its Garvin Falls steam plant. (R. 37). To handle this business it cut two switches into the track formerly leased to the Suncook Valley and lying within the 550 feet relinquished by the Suncook to the B. & M. by the modifying indenture. (R. 110). This was the purpose of the new modification. (R. 124).

No application to make this new contract, modify or affect the franchise, cut in the switches or to do this business was made to the Interstate Commerce Commission or the Public Service Commission and no authority or approval was ever obtained. (R. 72). No approval was ever sought from the stockholders of the Suncook Valley.

The Suncook Valley denies the validity of this amendment. Its present management claims that the Valley is entitled to proper and respective divisions from the Boston and Maine for all tonnage handled by the latter over the Suncook Valley leased main-line track and lost by the amended indenture. The reasons are:

> 1. No approval for the amendment was sought or obtained from the Interstate Commerce Commission or the New Hampshire Public Service Commission; 2. No effective and valid vote of either stockholders or directors was ever taken enabling the Valley's President to execute the new modification; 3. No consideration was ever had or received for the change.

At the annual stockholders' meeting on May 20, 1943, President Colbath and General Manager Fowler failed of re-election. Laurence M. Meyer and Edmond J. Stapleton were elected in their stead. On the very next day the Boston & Maine brought suit on an open account of long-standing between the Boston and Maine and Suncook Valley (Merrimack County Superior Court, Docket No. 5019). On or about March 17, 1945, the new management first learned the full provisions of the 1936 lease made by their predecessors and of

certain alleged votes of the Board of Directors and Executive Committee. (R. 74, 80). This was after Mr. Whittemore, the assistant to the President of the Boston and Maine, told the Suncook Valley that the Boston and Maine had sold its claim because it could not afford to "see the case out." (R. 79, 80).

The new management found on reviewing the old records of the Suncook Valley that at a meeting of its Executive Committee it was decided on December 18, 1940 to "negotiate" with the Boston and Maine re giving up the most northerly 550 feet of lease track above described. George Colbath and Mr. Head were the quorum present. President Colbath actually signed this modifying agreement in November, 1941. (Plaintiff's Exhibit A). The next and only other record of official action mentioning this lease amendment appears in the form of a vote at the annual directors' meeting May 21, 1942. Then it was voted to authorize the President to execute the amending lease, which he had already done in November, 1941. The record of this meeting was written by George S. Fowler, the former Clerk and General Manager, after he had been dismissed at the annual stockholders' meeting in 1943. (R. 94, 95, 108). This vote, which appears in quotation marks, was submitted to the Suncook Valley by the Boston and Maine "to execute in our records ***." (R. 92, 93). Why Mr. Lombard, who is recorded as having made the motion, was selected by the Boston and Maine to make the motion for the vote is unexplained. He does not recall making the motion. (Record 63, 64). None of the other Directors at the meeting who are alive, save Mr. Fowler, remember there was any discussion, any motion or any vote. (R. 55, 57, 60, 62, 63, 64, 71). Mr. Fowler, the then Clerk, said he felt Mr. Lombard made such a motion "since it is recorded that way, that is all." (R. 107).

The Boston and Maine was not satisfied with this Record of the full Board and insisted on its being improved by a vote of the Executive Committee. (R. 86). (Defendant's Exhibit 10). Sometime thereafter Mr. Fowler sent along a copy of an Executive Committee meeting alleged to have taken place on November 14, 1942 ratifying the full board meeting of May 21, 1942 and certified as taken from the books of the corpora-

tion. It never was on the books, and there never was any such record. (R. 67, 86). See Defendant's Exhibit 8. There never was any stockholders' vote of any kind approving the transaction.

After the full extent of the rights conveyed by the original lease became known to the new management, and after it discovered the method and the circumstances surrounding the loss of some of these rights in 1941, and after a demand for the full and proper divisions improperly withheld had been denied and refused, the Suncook Valley entered its action for set-off and counterclaim and the present issue joined.

The foregoing is a brief statement of the case.

There is no record of any approval, ratification or discussion by the stockholders of the modifying indenture of 1941.

The following excerpt from the lease, approved by both Federal and State Commissions, discloses the extent of the conveyance from the Boston and Maine to the Suncook Valley:

> "The Maine hereby lets and demises unto the Suncook, *** all that portion of the Maine's line of railroad approximately seven miles in length *** and all property, rights, powers, privileges and franchises of every description owned or held by the Maine in connection with said property, including among other things all branches, extensions and sidings and all lands, buildings, structures, fixtures, furniture, tools improvements and facilities of whatever kind or description now held or owned by the Maine for any purposes incident to or connected with the maintenance and operation of said line of railroad *** and also all the rights, powers, privileges and franchises, tolls and revenues, which the Maine may now or at any time hereafter during the term thereof lawfully exercise or receive in connection with the operation of said line of railroad; ***"

TIMELINESS

After transfer from the Superior Court of Merrimack County to the New Hampshire Supreme Court, the issue was argued at the March Term, 1946 and an opinion was rendered on April

2, 1946. A motion for a re-hearing was duly filed by the Suncook Valley Railroad, and on May 7th the New Hampshire Supreme Court ordered "motion for re-hearing denied." Thereafter the Boston and Maine Railroad filed a motion requesting that the Suncook Valley Railroad file a bond in the penal sum of Fifty Thousand Dollars, in addition to the existing attachment of all property of the Suncook Valley Railroad, as a condition of prosecuting its appeal to the Supreme Court of the United States pursuant to U. S. C. A. Title 28, section 350. The Supreme Court of New Hampshire, on consideration of the motion and after argument, ordered the Suncook Valley Railroad to file a bond in the penal sum of Forty Thousand Dollars, and upon the filing of the same the Boston and Maine Railroad was ordered to release all attachments made by it against the property of the Suncook Valley Railroad. The bond has been filed and the attachments have been released. This petition has been filed with the Honorable Court within three months of the date of final judgment and is therefore timely.

JURISDICTIONAL STATEMENT

Jurisdiction of the Supreme Court of the United States is invoked under and pursuant to the provisions of U. S. C. A. Title 28, section 344 (b).

Federal statutes of the United States are drawn in question. The New Hampshire Supreme Court in dismissing the Suncook Valley Railroad's counterclaim in fact decided a Federal question of substance not in accord with applicable decisions of this Court. Two Federal statutes are drawn in question:

U. S. C. A. Title 49, section 1 (18)

> "No carrier by railroad subject to this chapter shall undertake the extension of its line of railroad, or the construction of a new line of railroad, or shall acquire or operate any line of railroad, or extension thereof, or shall engage in transportation under this chapter over or by means of such additional or extended line of railroad unless and until there shall first have been obtained from the Commission a certificate that the

present or future convenience and necessity require or will require the construction, or operation, or construction and operation of such additional or extended line of railroad."

U. S. C. A. Title 49, section 5 (2) (a) (II)

"It shall be lawful, with the approval and authorization of the Commission as provided in such subdivision (b) *** (II) for a carrier by railroad to acquire trackage rights over, or joint ownership in or joint use of, any railroad line or lines owned or operated by any other such carrier, and terminals incidental thereto. ***"

The history, construction, theory and language of the Transportation Act require that carriers must obtain permission from the Interstate Commerce Commission before extending railroad operations whether they be extensions by construction or extensions by acquisition of existing facilities. A railroad corporation subject to the Transportation Act cannot disable itself from performing its duties to the public. There is no inherent power without Commission approval to give away or destroy its valuable franchise rights. A carrier subject to the Transportation Act or even two carriers both subject to the Transportation Act may not by agreement modify in any degree, much less to a substantial degree, the judgments and orders of the Interstate Commerce Commission. "Trackage rights acquired without the consent and approval of the Commission are unlawful §5 (4)" *Thompson et al. vs. The Texas-Mexican Railway Co.* No. 42, October Term, 1945 Supreme Court of the United States.

The Supreme Court of New Hampshire in substance upheld and gave its sanction to the Boston and Maine Railroad's modifying the Interstate Commerce Commission approved lease from the Boston and Maine Railroad to the Suncook Valley Railroad even though the Suncook Valley Railroad before the Superior and Supreme Courts had argued that such an extension by the Boston and Maine Railroad through lease modification was illegal and of no consequence.

A Federal question can be determined by a state court through indirection and by the result of its decision, even though the Federal statute has not been dealt with, as such. Federal rights can be denied by a refusal of a State Court to decide questions presented just as effectively as they may be denied by an incorrect decision of them. *Lawrence vs. State Tax Commission 286 U. S. 276, 282.*

The basis of the New Hampshire decision is not adequate or independent. It is so interwoven with the federal question (need for Interstate Commerce Commission approval to modify an existing Commission order) that it is incapable of separate treatment or determination. The New Hampshire Supreme Court held that it need not consider the application of the Federal statutes

> "accordingly it becomes unnecessary in this action to determine the validity of the modifying agreement"

Supreme Court Opinion, page 6.

It held further that if the Suncook did not itself haul the cars between Concord and Bow it could not recover from the Boston and Maine Railroad under the terms of the lease even though it stated that the right to haul the cars "was solely in the Suncook." This is modifying an Interstate Commerce approved lease without the Commission's approval, all contrary to the statutes therein provided and contrary to the very purpose of the Transportation Act. *Thompson et al. vs. The Texas-Mexican Railway Co.* (Supra).

During the trial before the Superior Court, the Suncook alleged that the modifying indenture to the original lease was invalid not only because of inadequate corporate action but because there were no Interstate Commerce Commission or New Hampshire Public Service Commission certificates of convenience and necessity obtained. This allegation was recognized by the Superior Court when it transferred the issue of liability to the Supreme Court without a ruling (see pages 6, 16, and 20 of the transferred case). The briefs of both parties for the Supreme Court are concerned largely with the Federal issue involved. (See briefs). The Supreme Court itself on page 4 of its opinion declared that there had

> "been much discussion by both parties concerning the need of approval by the Interstate Commerce Commission or the New Hampshire Public Service Commission, and if such is needed, the effect of the absence of it."

The Federal issues inescapably involved in this case are not, therefore, presented here for the first time but have been argued and relief upon as a major issue from the start.

One question presented, therefore, is whether the B. & M. can acquire franchise rights of a connecting interstate carrier, as it did in this case, without the consent of the Interstate Commerce Commission.

ARGUMENT

The stockholders of the Suncook Valley have been deprived of a valuable franchise right. The financial condition of the Suncook (as the B. & M. argues in its brief as a sort of justification) is not good.

The loss in revenue occasioned by the former management's divesting the railroad of part of the franchise rights seriously endangers the continued existence of the Suncook. The new management, upon learning the extent of the Suncook's rights and the manner in which they had been lost, took prompt and vigorous action. There has not been any stockholders' action authorizing or approving the modifying indenture, and there can be no estoppel in a case where a carrier attempts to absolve itself from its obligations without the consent of the state. *Union Pacific Railroad vs. Rock Island R. R. Co. 163 U. S. 564.*

The Suncook argued to the New Hampshire Supreme Court that the modifying indenture, the B. & M.'s defense to the Suncook counterclaim, was void because there had been no Interstate Commerce Commission or New Hampshire Public Service Commission approval. The authorities were carefully set forth in its brief, PP. 13-18, with especial reference to *Company vs. West Virginia Northern R. R. Co. 145 S. E. 42* (citing *Pullman Car Co. vs. Central Trans. Co. 171 U. S. 138);* and *Taylor vs. Santa Fe Ry. 34 P. 2 1102.*

These State Court decisions held that conveyances of trackage or lease rights without Interstate Commerce Commission approval were void and of no effect.

The *Texas Mexican Ry.* (supra) opinion came down after the opinion of the New Hampshire Supreme Court and only a few days before the motion for a re-hearing was denied. It had to be called to the Court's attention by a supplemental brief.

What the Suncook Valley was seeking by its counterclaim were the divisions it was entitled to have, pursuant to the Interstate Commerce Commission approved lease of 1937. The Courts of New Hampshire were not called upon to fix or determine reasonable compensation for the Boston and Maine's improper use of the Suncook's tracks. They were simply asked to establish the B. & M.'s liability arising from the unambiguous lease and to deny the validity of the modification of the lease. Judicial assistance was sought, therefore, to preserve and maintain rights created by the Commission and not to inject the Courts into fields of administrative authority.

The B. & M. was compensated by an extra charge received from the shippers for hauling these cars to and from Bow Jct. In addition to retaining the divisions, it received $3.00 per car for "extra haulage." (R. 120). The Suncook Valley's claim, therefore, is not clouded by any theory of unjust enrichment.

CONSEQUENCES OF DENYING RELIEF SOUGHT

If the relief sought is here denied and the decree of the New Hampshire Supreme Court is sustained, there will be established a precedent allowing carriers themselves voluntarily to terminate a trackage contract and enter into a new one without the approval of the Commission. This is in violation of the Transportation Act. It is contrary to the decision of *The Texas Mexican Railway Company* case (supra). The function of the Commission is to establish conditions and terms of trackage contracts. To deny this would allow all railroads and public service corporations to circumvent regulatory laws by indirection and by private agreement. Regulation would then depend upon the willingness of the parties to submit to it;

and the discretion or wishes of boards of directors would be substituted for the opinions and orders of the Commission.

WHEREFORE, your petitioner respectfully prays that a writ of certiorari be issued under the seal of the Court to the New Hampshire Supreme Court commanding the latter to certify and send to this Court, a full and complete transcript of the record and of the proceedings in the New Hampshire Supreme Court and in all prior proceedings brought by appeal to that Court had in said cases hereinabove described, to the end that this cause may be reviewed and determined by this honorable Court as provided by the Statutes of the United States, and that the judgment of the New Hampshire Supreme Court may be reversed, and for such further relief as may seem proper to this Court.

Respectfully submitted,

SUNCOOK VALLEY RAILROAD
By its Attorneys,
MAYLAND H. MORSE,
GEORGE R. GRANT, JR.

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TABLE OF CASES

Supreme Court of the United States

OCTOBER TERM 1946

No. 358

SUNCOOK VALLEY RAILROAD, PETITIONER

v.

BOSTON & MAINE RAILROAD

PETITION FOR WRIT OF CERTIORARI TO THE NEW HAMPSHIRE SUPREME COURT

STATEMENT OF THE CASE

1. THE SCOPE OF THIS BRIEF

This petition is addressed to the decision of the New Hampshire Supreme Court in the case of *Boston & Maine Railroad* v. *Suncook Valley Railroad*, 94 N. H. 81, 46 Atl. 2d. 773. Because it seems so clear, as hereinafter pointed out, that the Federal questions which the petitioner undertakes to bring to this Court for review were in no way involved in the decision of the New Hampshire Supreme Court, we will not undertake at this time to argue the merits of those questions and this brief will be devoted simply to the proposition that the New Hampshire decision involved no Federal questions to give the petitioner the right to a review by this Court.

2. THE FACTS

Because the pertinent facts are largely set forth in the New Hampshire Court's statement of the case and its opinion printed at *pp.* 144-148, inclusive, of the Record, the facts will be detailed here only to the extent necessary to correct inaccuracies and omissions in the petition and to supplement the facts already

stated in the New Hampshire Court's opinion and in the petition to the extent necessary to enable this Court to properly understand the case. It should be noted at the outset that the petitioner's counterclaim on which it seeks recovery in this case is based solely on the provisions of an admittedly valid lease of the Boston & Maine Railroad to Suncook Valley Railroad, dated May 25, 1936, and approved by the Public Service Commission of New Hampshire and by the Interstate Commerce Commission (R. *p.* 144; see also the Petition for Writ of Certiorari, *p.* 2). Under the terms of this lease Suncook Valley Railroad was given a lease of the Suncook Loop, so-called, extending for approximately 7 miles northerly from the Town of Suncook to the point where it intersected with the easterly line of the Boston & Maine's main line right of way and trackage rights from there on into the City of Concord to the north.

In 1939 the Boston & Maine deeded a tract of land in Bow on the west side of the northerly 550 feet of the leased portion of the Suncook Loop to the Merrimack Farmers' Exchange. As will more fully appear from an examination of the deed and plan of this tract (Df's. Exhs. 13 and 13a) and from an examination of the plan of the tracks and construction in this vicinity (Pl's. Exh. 2) and from the findings of the Superior Court, this tract on which the mill was later constructed was situated in the angle formed by the intersection of the Boston & Maine's main line with the Suncook Loop, so-called. It was bounded on the northwest by the Boston & Maine's main line right of way, on the northeast by the Suncook Loop right of way, on the north by a triangle bounded southerly by the tract conveyed to the Exchange, northwesterly by the Boston & Maine's main line right of way and northeasterly by the Suncook Loop right of way; and could have been served, (1) from the Boston & Maine's main line to the west, (2) from the northerly portion of the leased portion of the Loop or (3) by means of a longer switch and more expense to the Exchange from that portion of the Loop to the north of the leased portion (R. *pp.* 17, 144, 145). By December 1941 the Exchange had completed the construction of a mill on this tract of land and sidetracks had been put in to serve the mill from the northerly 300 feet of the leased portion of the Suncook Loop, so that the

Boston & Maine in hauling freight to and from the Exchange as it did thereafter used about 300 feet of the northerly end of the leased portion of the Suncook Loop (R. *p.* 144). The Boston & Maine had prior to this time been serving the Exchange at a former site in the Concord freight yard. The new mill which it has been serving since December 1941 and the 300 feet of the leased portion of the Loop are also located in the Concord freight yard (R. *pp.* 17, 144), so that the new operations from 1941 to March 1945, of which the petitioner complains in this case, involved simply the continuation of the Boston & Maine's former service to the Merrimack Farmers' Exchange at another point within the Concord yard limits.

For a period of over three years, and until March 1945, the Boston & Maine continued to serve the Exchange in its new location without "a word of warning or . . any other act . . to indicate that it [the petitioner] claimed the revenue from such service or . . that the plaintiff had no right to provide the freight service to the Exchange. Defendant's silence, with such knowledge, indicated acquiescence and assent" (R. *p.* 19). The Exchange bought the tract in question and constructed its new mill upon assurances from the Boston & Maine that it would be served by it (R. *p.* 144). "It would not have made the move it did if it would have had to depend upon the service of the Suncook, which was unsatisfactory to it. The Suncook could not have gotten the business of the Exchange" (R. *pp.* 17, 144, 145). As further pointing up this situation, in the language of the Superior Court

> "When the construction of the new mill was under consideration, the defendant was in serious financial difficulties. Its service was inadequate and unreliable. Its total rail equipment consisted of one engine and one passenger car. Its roadbed was dilapidated in many places . . . Its general manager unsuccessfully attempted to persuade the Exchange Officials that the defendant could serve the new mill adequately, but the officials did not dare to risk their venture on the unsatisfactory type of service defendant was able to give. The defendant would not have obtained the Exchange business even though the defendant had retained control of the 550 feet of trackage at Bow Junction." (R. *p.* 17)

As further pointing up the circumstances as they existed in 1941, the Boston & Maine's Requests for Findings, Nos. 3-5, inclusive, were granted by the Superior Court (R. *p.* 21), as printed at *p.* 12 of the Record, as follows:

> "3. The construction of the sidetracks at the Exchange mill at Bow by the Boston & Maine Railroad, and the operations of the Boston & Maine Railroad in servicing the Exchange mill at Bow resulted in no loss of revenue by the Suncook Valley Railroad.
>
> 4. Adequate railroad service was vital to the Merrimack Farmers' Exchange (see Record, *p.* 147).
>
> 5. The Suncook Valley Railroad was in 1940 and 1941 and has ever since been unable to furnish adequate switching service at the Exchange mill at Bow."

In view of these circumstances, an agreement in amendment of the 1936 lease, of which neither the Boston & Maine nor the Suncook Valley asked approval of either the Public Service Commission of New Hampshire or the Interstate Commerce Commission, was executed effective as of November 1, 1941. By the terms of this agreement (Pl's. Exh. A) it was provided that the northerly 550 feet of that portion of the Suncook Loop included in the 1936 lease should no longer be under lease to the Suncook Valley and that the Suncook Valley should thereafter have trackage rights only over this 550 feet into which the switches serving the Exchange mill were cut. Confronted with a suit to recover an admitted indebtedness of $37,233.49 (R. *p.* 15), the petitioner in March 1945 (R. *p.* 19) for the first time objected to the transaction of the Exchange business by the Boston & Maine and filed its counterclaim to recover, under the provisions of the May 25, 1936 lease, tolls and revenues collected by the Boston & Maine in the transaction of the Exchange business at the new site (R. *pp.* 10, 11).

The Boston & Maine justified its position on three grounds: (1) that there could be no recovery under the terms of the original lease (B. & M.'s brief in the State Court, *pp.* 15 *et seq*); (2) that if the first defense fail, the amended lease was valid without the approval or authorization of either the Public Service

Commission of New Hampshire or the Interstate Commerce Commission (B. & M.'s brief in the State Court, *pp.* 35 *et seq*); and (3) that even if the lease amendment required commission approval, it was not void for lack of it but was at the most an illegal agreement and that the petitioner could not recover under well recognized authority to the effect that where the parties are in *pari delicto* there can be no recovery of any sums collected under an illegal contract (B. & M.'s brief in the State Court, *pp.* 39 *et seq*). The State Court sustained our first position so that it became unnecessary to consider issues raised by our second and third defenses.

ARGUMENT

The Federal questions which the petitioner seeks to have reviewed by this Court are stated at pages 1 and 2 of the petition for writ of certiorari and need not be restated here. They all involve questions raised by Boston & Maine's second defense which ***might have been material*** in and ***might have been decided*** by the Supreme Court of the State of New Hampshire, but which *did not become material* and *were not decided* by the State Court, because the State Court's decision sustaining the Boston & Maine's first defense made it unnecessary to consider its alternative defenses and the issues raised thereby. The question decided by the New Hampshire Supreme Court was a very narrow one. It appears in the statement of facts preceding the opinion of the Court, from which we quote as follows:

> "Debt, for rent due under a lease dated May 25, 1936 . . . The defendant . . filed a plea of set-off by which it sought from the plaintiff . . the sum of $146,575, which it alleged was due under the provisions of said lease. The defendant in its second supplemental brief stated its claim as follows: 'these "divisions" due the Suncook under the 1936 lease are what is sought by this counterclaim.' Issue was joined on this claim.
>
> The portion of the lease relied upon by the defendant is as follows: 'The Maine hereby lets and demises unto the Suncook . . and also all the rights, powers, privileges and franchises, tolls and revenues, which the Maine may now or at any time hereafter during the

> term thereof lawfully exercise or receive in connection with the operation of said line of railroad; . . . '" (R. *p.* 144)

As further showing the limited nature of the issue to be decided, the Court's statement of the case continues after pointing out that the revenues sought to be recovered were received by the Boston & Maine for services in the hauling of freight to and from the Exchange, rendered in good faith by the Boston & Maine, and that the petitioner could never have had the business, as follows:

> "The defendant does not seek to recover from the plaintiff because of a breach of the covenant for quiet enjoyment or upon any other ground than the express provision of the lease above quoted; nor is this an action to recover possession of the tracks used by the plaintiff." (R. *p.* 145)

The nature of the Court's decision and the immateriality of the questions which the petitioner now seeks to have reviewed are further emphasized by the language of the opinion itself, in which the Court said

> "There has been much discussion by both parties concerning the execution of the release, the matter of consideration, the need of approval by the Interstate Commerce Commission or the New Hampshire Public Service Commission and, if such is needed, the effect of the absence of it. In the present proceeding, however, the Maine does not have to justify its receipt of freight revenues from the exchange business. It is asking for no relief from the courts under the modifying indenture. *The Suncook must depend upon the strength of its claim. Since this is what it alleges, it must establish under the quoted clause of the lease its legal right to the revenues paid to the Maine for the freight of the exchange hauled over a part of the 550 feet of the loop that was purportedly released.*" (R. *p.* 146)

The Court then proceeds in that portion of the opinion appearing at *pp.* 146 and 147 of the Record to demonstrate that

under any proper interpretation of the lease the tolls transferred to the petitioner under the terms of the lease were only tolls earned by the petitioner; that the tolls which the petitioner sought to recover were earned by the Boston & Maine, were not within the contemplation of the lease and, therefore, not assigned to the petitioner thereunder and not to be recovered from the Boston & Maine. And again referring to the questions upon which the petitioner now seeks a review, the Court said

> "Accordingly it becomes unnecessary in this action to determine the validity of the modifying agreement." (R. *p.* 148)

In its frantic endeavor to support its claim that the State Court in some way upheld the validity of the "release" of 1941, the petitioner argues that a question can be determined by a state court through indirection and by the result of its decision and that this case in some way falls within the principle of *Lawrence* v. *State Tax Commission,* 286 U. S. 276. A complete and full answer to this claim is that that case is in no way analogous to the case at bar. The decision in that case is based on the premise that an answer to a Federal question was sought and no answer given even though the jurisdiction of the court had been invoked for that purpose. See the first paragraph at *p.* 282 of the opinion in that case. In that case a determination of the plaintiff's rights necessarily involved a determination of a Federal question, which the Court for specious reasons refused to decide. In this case the petitioner's rights depended solely on a question of New Hampshire law,—the interpretation of the admittedly valid lease of May 25, 1936. If the Court had undertaken to decide the Federal questions which the petitioner now presents to this Court for review and which became immaterial by reason of the Court's interpretation of that lease to bar recovery, the petitioner's rights would not have been affected thereby. As pointed out by the State Court, the petitioner had to rely on the strength of its own case; it relied solely on the lease of May 25, 1936; and it made no difference whether the "release" of November 1941 was valid or not. The petitioner could not recover in either case.

The petitioner in its further endeavor to support its position by argument clearly points up this distinction when it says at *p.* 11 of the petition for writ of certiorari

> "The Courts of New Hampshire were not called upon to fix or determine reasonable compensation for the Boston and Maine's improper use of the Suncook's tracks. They were simply asked to establish the B. & M.'s liability arising from the unambiguous lease. . . Judicial assistance was sought, therefore, to preserve and maintain rights created by the Commission and not to inject the Courts into fields of administrative authority."

And right here lies the nub of this question. The petitioner did not invoke the jurisdiction of the New Hampshire courts to determine the validity or invalidity of the "release" to which the Federal questions which it now asks this Court to review were addressed. It did not ask the State Court to fix or determine reasonable compensation for the Boston & Maine's use of the track in question, and as pointed out by the State Court in its statement of the facts at *p.* 145 of the Record, it did not seek to recover for a breach of the covenant for quiet enjoyment nor to recover possession of the tracks used by the Boston & Maine. In the petitioner's own language above quoted, the New Hampshire courts "were simply asked to establish the B. & M.'s liability arising from the unambiguous lease. . ."

The petitioner's further allegation in the same sentence that the New Hampshire courts were asked to deny the validity of the modification of the lease requires brief comment. They were asked to uphold the validity of the modification of the lease not by the petitioner but by the Boston & Maine and they were asked to uphold the validity of the modification of the lease only if it became material by reason of the fact that the Court should be of the opinion that recovery could be had under the terms of the original lease. Because the Court determined that recovery could not be had under the terms of the original lease, it became unnecessary to decide this question. The only question asked by the petitioner, and the only question decided by the Court, was a question of strictly New Hampshire law, a question dependent solely on the interpretation of the language of the lease of May

25, 1936. By reason of the nature of that decision, no further questions were involved, no further questions had to be decided and the decision of any further questions would not have affected the result. The petition for writ of certiorari should be denied for this reason.

Respectfully submitted

Jonathan Piper
Sulloway Piper Jones Hollis & Godfrey
Attorneys for Boston & Maine Railroad

Supreme Court of the United States

SUNCOOK VALLEY RAILROAD vs. BOSTON & MAINE RAILROAD	*Petitioner*

No. 358

BOSTON & MAINE RAILROAD vs. SUNCOOK VALLEY RAILROAD AND SUNCOOK VALLEY RAILROAD vs. BOSTON & MAINE RAILROAD on a counterclaim	*In the Matter of*

PETITION FOR REHEARING ON DENIAL OF PETITION FOR A WRIT OF CERTIORARI TO THE NEW HAMPSHIRE SUPREME COURT

To the Honorable The Supreme Court of the United States:

Your petitioner, Suncook Valley Railroad, respectfully submits this petition for a rehearing on the denial by this Court of the petition for a writ of certiorari to review the decree of the New Hampshire Supreme Court's dismissing the counterclaim of Suncook Valley Railroad, the counterclaimant and defendant in the above-entitled cases.

The denial by this court of the petitioner's application for a writ of certiorari without having stated the grounds therefor leaves unanswered the Federal questions whether:

1. The I. C. C., having approved a lease between two interstate railroads, must not also approve any

subsequent change in the territory each carrier is to serve as a prerequisite to the change.

2. The rentals to be paid under a lease approved by the I. C. C. between two interstate railroads validly may be altered by agreement between the contracting parties without application to the I. C. C.

3. Two railroads by mutual agreement may alter the terms of a lease of a line of railroad which lease was approved by the I. C. C. without first applying for I. C. C. formal approval when by such modification there results a substantial revenue loss to one railroad and corresponding gain to the other railroad.

4. The financial life or death of a railroad may be resolved by agreement between it and another railroad by changing the terms of an I. C. C. approved lease between the railroads without getting or applying for I. C. C. approval for the modification.

5. A state court that ignores the question of the authority of the I. C. C. may thereby defeat the raising of the Federal question in the Supreme Court of the United States.

6. A state court that ignores the authority of the I. C. C. and in effect repeals the power imposed by Congress on the I. C. C. precludes judicial review by the Supreme Court of the United States.

7. The public served by two regulated interstate railroads is subject to the whim of the management of the carriers as to which carrier will serve a particular territory when theretofore for the public good the I. C. C. had designated what area each railroad should serve.

The State Courts could have given to the Suncook Valley Railroad the relief that it sought by recognizing the authority and jurisdiction of the I. C. C.; they could not, however, encroach and impinge upon the functions and duties of the Commission simply by denying their pertinance in this case.

Therefore your petitioner prays that a rehearing be granted on its said petition for a writ of certiorari, and for such further relief as may seem proper to this Court.

Respectfully submitted,

SUNCOOK VALLEY RAILROAD,
By its Attorneys,
Mayland H. Morse,
George R. Grant, Jr.

STATE OF NEW HAMPSHIRE
MERRIMACK, SS.

We Mayland H. Morse and George R. Grant, Jr., hereby certify that the foregoing petition for rehearing is presented in good faith and not for delay.

MAYLAND H. MORSE,
GEORGE R. GRANT, JR.

Subscribed and sworn to before me the undersigned authority by Mayland H. Morse and George R. Grant, Jr., both to me known this fourth day of November 1946.

FREDERICK S. HALL,
Notary Public.